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Discussion of substantive issues related to international cooperation in tax matters: transfer pricing: practical manual for developing countries

Report on the informal meeting on practical transfer pricing issues for developing countries

Note by the Secretariat

The annexed report, prepared by the Secretariat, is on the informal meeting on practical transfer pricing issues for developing countries held on 7 and 8 June 2011 at United Nations Headquarters in New York. The meeting was co-sponsored by the Financing for Development Office of the Department of Economic and Social Affairs of the Secretariat, the New York office of the Friedrich Ebert Foundation, the Center of Concern and Christian Aid. Materials relating to the meeting, including a more detailed version of the annexed report, may be found at http://www.un.org/esa/ffd/tax/2011_TP/index.htm.

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Annex

Report on the informal meeting on practical transfer pricing issues for developing countries*

Introduction

1. The informal meeting on practical transfer pricing issues for developing countries was co-sponsored by the Financing for Development Office of the Department of Economic and Social Affairs, the New York office of the Friedrich Ebert Foundation, the Center of Concern and Christian Aid. The objectives of the meeting were: (a) to assist the Subcommittee on Transfer Pricing — Practical Issues, of the Committee of Experts on International Cooperation in Tax Matters (the Subcommittee) in ensuring that developing country perspectives, priorities and experiences were fully reflected in the United Nations Transfer Pricing Practical Manual for Developing Countries, which the Subcommittee is preparing; and (b) to familiarize the Permanent Missions to the United Nations with the issue of transfer pricing and the costs to development of "improper pricing" by multinational enterprises, which are widely considered to be extremely high. Expected outcomes included an informed discussion on the issues of transfer pricing in the context of development and specific new input from developing countries to the draft chapters of the Practical Manual. It was not necessary to reach a consensus on specific issues, although that would be noted where it was achieved.

2. Sixty participants from Governments (including representatives and advisers from Permanent Missions to the United Nations, business, non-governmental organizations, international organizations and academia) attended the meeting.

3. Alexander Trepelkov, Director of the Financing for Development Office of the Department of Economic and Social Affairs, and Werner Puschra, Executive Director of the New York office of the Friedrich Ebert Foundation delivered the welcoming remarks. The Director of the Financing for Development Office thanked the Friedrich Ebert Foundation, the Center of Concern and Christian Aid for their strong support in organizing the meeting. He noted that the involvement of such bodies added an extra dimension to the discussion on international tax cooperation and the role of the United Nations in that area.

4. The Director also noted that the main purpose of the meeting was to fully reflect the perspectives, priorities and experiences of developing countries in the United Nations Transfer Pricing Practical Manual for Developing Countries. He gave a brief history of the Practical Manual project, referring to the mandate of the Subcommittee on Transfer Pricing — Practical Issues. The need for a staged approach suitable to the specific stage of development of each country and the need to explore the flexibilities that might be applicable for developing countries, consistent with the United Nations Model Double Taxation Convention between Developed and Developing Countries (United Nations Model Convention), was also addressed.

* The views expressed in the present report should not necessarily be taken as representing those of the Committee of Experts or the United Nations. The Secretariat is responsible for any errors and omissions.

5. The Director noted links to the work of the Committee as a whole and to that of its other subcommittees. He indicated that there had been great interest in the Organization's work on transfer pricing and acknowledged the importance of collaborating with others active in the area, while recognizing the deep need for globally inclusive approaches and the special role of the United Nations in that respect.

6. The Director of the Friedrich Ebert Foundation noted the particular role of the Foundation's New York office in liaising on issues of global economic governance and international peace and security. He underlined its long-standing support to the financing for development process and the work of the Financing for Development Office. He noted that taxing and public finance had become high-profile issues internationally and that they had become especially important because they related to what people expected from their Governments. Lastly, he stressed that more needed to be done to improve international tax cooperation.

7. The Assistant Secretary-General for Economic Development, Jomo Kwame Sundaram, delivered a keynote address, emphasizing the development context of transfer pricing issues, and the fact that failure to price transactions in a way that truly reflected the profits earned in a country unfairly deprived it of funds and opportunities for development. Similarly, a country taxing more than the fair share of profits generated within its jurisdiction could lead to double taxation, which might result in negative effects on the investment climate and therefore on a country's development potential.

8. The Assistant Secretary-General noted that most countries, including developing countries, seeking to address transfer mispricing had adopted the "arm's length principle" as their response to the issue and that the real difficulties and unfairness arose not so much from the theory in itself but from its practical application. He emphasized the need for targeted and needs-responsive capacity-building and for helping countries to create investment environments that reduced compliance costs for businesses seeking to enter mutually beneficial long-term partnerships for development. International institutions must work together cooperatively and developing countries must be actively engaged.

9. Addressing the issue of what the United Nations could bring to the table in meeting those needs, the Assistant Secretary-General referred to the universal membership, mandate and legitimacy of the United Nations, which embraced all viewpoints, as well as its ability to work cooperatively with other organizations, businesses, civil society stakeholders and individual countries.

10. In concluding, the Assistant Secretary-General noted that the United Nations could play a greater role in ensuring that all parties with an interest in the "rules of the game" had a seat around the table in developing those rules. Such inclusiveness would help to ensure that the rules addressed the real complexities of tax systems and international tax cooperation; respected the sovereign right of countries to determine their tax systems while also recognizing the "spillover" effects of such decisions internationally; and best meet the challenges of development.

Agenda item 1
The role of the United Nations in international tax cooperation, the impact of transfer pricing on sustainable development and possible responses

Panel 1: Broader international tax cooperation issues

11. The purpose of panel 1 was to set the stage for discussing transfer pricing issues, and, in particular, to elaborate the role of the United Nations in international tax cooperation issues.

12. The Director of the Financing for Development Office focused his presentation on the proposals for conversion of the Committee of Experts on International Cooperation in Tax Matters into an intergovernmental body and briefed participants on the report of the Secretary-General on the strengthening of institutional arrangements to promote international cooperation in tax matters, including the Committee of Experts on International Cooperation in Tax Matters (E/2011/76) prepared in response to a request by the Economic and Social Council.

13. The Director noted the outline of the report and said that it identified three options for strengthening institutional arrangements for consideration by the Council: (a) strengthening existing arrangements; (b) converting the Committee into an intergovernmental commission; and (c) creating a new intergovernmental commission while retaining the current Committee. A first discussion on the report by the Council on 26 April 2011 showed mixed support for converting the Committee. Informal consultations among Governments on a relevant draft resolution (E/2011/L.13) tabled by Argentina on behalf of the Group of 77 and China on 1 June 2011 were noted as ongoing.

14. The first speaker from the panel underlined the role of the Committee in supporting developing countries in international tax matters. He noted business interest in the role of the United Nations in those areas, especially since the Committee was currently considering transfer pricing issues. He also noted that persons from both developed and developing countries working together could achieve rules that worked for all, recognizing that the diversity of the approaches adopted by developing and developed countries. Virtually all tax treaties were predicated on sound arm's length approaches, but the application of the arm's length principle could be very complex in practice. A sound approach that examined functions, assets and risks could lead to sharing of tax revenues on an equitable basis. Although Organization for Economic Cooperation and Development (OECD) guidelines on the complex issue of transfer pricing existed, there was a need to provide practical guidance on dealing with transfer pricing issues and applying the arm's length principle to developing countries. It was important that the United Nations work should be consistent with the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations rather than duplicate the work of OECD and others, and that it should provide greater guidance on the practical application of the arm's length principle. In that respect, business needed legal certainty, including guidance that was consistently applied across countries.

15. The second speaker stressed that the role of the United Nations in international tax cooperation was based on its universal acceptance and legitimacy. The Organization was well placed to support tax administrations in developing countries

in cross-border taxation issues and had a key role in building national capacity to increase the effectiveness of tax administrations. He underlined that developing countries should strike a balance between revenue generation and creating an enabling investment climate.

16. Another speaker emphasized that civil society organizations supported a stronger role for the United Nations in international tax cooperation. The Organization had a number of comparative advantages over other forums in that: it included the representation of developing countries; it was a political forum with convening power; it could address tax matters in an integrated way, in conjunction with issues such as trade and investment. The speaker noted that "duplication of resources" arguments and "mission creep" should not be allowed to displace legitimate United Nations roles. He underlined that there was a difference between developing countries being invited to a meeting to discuss issues, on the one hand, and having a seat at the table when key decisions were made, including voting rights and the ability to exert influence, on the other.

17. In the ensuing discussion, the Chair noted two particular issues: (a) if the Committee was transformed into an intergovernmental commission, what structure should it have; and (b) what was the Organization's role in developing transfer pricing guidance. With regard to the latter, business representatives noted that there would be difficulties if there were competing messages from the United Nations and OECD. Developing countries noted the need for more practical guidance based on their realities.

18. In the general discussion, it was noted that the purpose of the Practical Manual was not to create an alternative to the OECD Transfer Pricing Guidelines but to preserve the same "arm's length principle" as the OECD Model Double Tax Convention on Income and on Capital and the Guidelines and to make it easier to apply the arm's length principle in practice. Referring to the issue of duplication, some participants from developing countries noted that there was no monopoly on ideas in that area and that there could only be "duplication" if the same countries were represented in the different forums, which was not often the case.

Panel 2: Specific transfer pricing issues

19. The Chair introduced a range of specific transfer pricing issues, including the impact of transfer pricing on development, options for developing countries to tackle transfer pricing and the role of the Committee in transfer pricing.

20. The first speaker stressed that the impact of transfer pricing on development was a crucial issue and that transfer pricing had to be seen in the broader context of economic and tax policies. Developing countries needed to generate revenue for development purposes, while at the same time promoting business activities. Depending on the economic structure, developing countries might have different approaches to transfer pricing. In addition, dispute settlement mechanisms were an important factor in addressing cross-border taxation issues.

21. Another speaker pointed out that identifying correct transfer prices was also a challenge within corporations. Following corporate globalization, certain industry trends and the rise of secrecy jurisdictions, there had been an increase in the abuse of transfer pricing to avoid taxation. Such abuses accounted for a significant loss of

tax revenues worldwide. In order to improve the basis for decision-making, he called for more empirical research and data collection on transfer pricing.

22. A third speaker identified knowledge gaps among legislators and the private sector as major constraints in establishing transfer pricing regulation. Awareness-raising, international dialogue and education were therefore critical. To facilitate addressing transfer pricing in developing countries, there was a need to design easy, cheap and creative solutions.

23. Another speaker noted that taxation and development were high priorities in the work of the European Commission and that, as a result, one of its important objectives was to enhance the capacity of developing countries in transfer pricing. To that end, the Commission had initiated a study on how to support developing countries in designing and implementing transfer pricing legislation. One preliminary finding was that introducing transfer pricing legislation typically led to higher tax revenues.

24. In the discussion, participants stressed the asymmetric information between multinational enterprises and developing country tax authorities in the context of evaluating intra-group transactions as a crucial challenge. Capacity-building in developing countries and improving data availability and information exchange on transfer pricing were seen as key action points.

Agenda item 2
The business framework for transfer pricing

25. The first speaker addressed the day-to-day issues for businesses dealing with transfer pricing issues, emphasizing that there was no one type of "firm" — they all differed. The requirement for tax managers in private companies was to maximize returns for shareholders, but in a sustainable way. Tax managers should not care where they paid tax as long as they paid tax only once. In the speaker's experience, tax managers spent most of their time avoiding double taxation and many did not have time for aggressive tax planning. He welcomed United Nations involvement in transfer pricing through the Practical Manual, since his firm dealt with people from many countries that were not members of OECD.

26. He also expressed the view that safe harbours could be good or bad from a corporate perspective, but once they were in place there was no obligation to maximize tax payments. Transfer pricing was complex and simple responses often would not work; however, a simple approach that often worked well in practice was that, once Governments become involved, tax managers should stand aside and let them decide the matter with a view to companies paying tax only once — hence the importance of good dispute resolution mechanisms. He indicated that there were legitimate opportunities for arbitrage, but one had to be practical and use common sense.

27. Another speaker noted the importance of the chapter on the business framework in setting the scene for the Practical Manual. His major concern as a tax administrator was capturing the true value of functions and activities carried out in his country. Generally, market pricing at independent market value was an acceptable measure of the value created in a particular jurisdiction, although sometimes that was not fully the case. He also noted that even though there were

examples of aggressive tax planning and abuse, transfer pricing was generally about day-to-day dealing with unavoidable transactions within the group. Transfer pricing was complex and difficult but not "unenforceable" and was a very important part of the tax environment.

28. Another participant noted that different corporate groups had different models and that some developing country multinational models might be different. For example, they might be more family-driven. Countries should understand such issues and not have transfer pricing regimes just because it was the fashion. Some countries had chosen not to have specific regimes because of the compliance costs for business.

29. The same speaker said there was no clear international definition of the arm's length principle. The current approach to the principle was the OECD approach, and when introducing the concept to developing countries, it might be necessary to modify it. A more apportionment-based model could be developed in the initial stages and the full-fledged arm's length model could be followed later, as capacities developed. The beginning of the business framework chapter of the Practical Manual could describe that approach more clearly.

30. One participant noted the potential of transfer pricing regimes to capture the value of operations of multinational enterprises in developing countries, while recognizing that there were also risks of hampering investment, double taxation, costs of compliance, uncertainty and so forth. All of those factors needed to be considered in a balanced way. He noted that apportioning profit was very difficult because multinational enterprises offered synergies and economies of scale to unlock value not available on a country-by-country basis. The United Nations work could help to ensure effective legislation and non-governmental organizations had a potential role in assisting parliamentarians in understanding the issue in countries considering legislating.

31. He indicated that access to information and risk management were key issues and that country-by-country reporting would help developing countries to identify high-risk issues. He noted the reality of increasing scrutiny not just of company profits but also the ethics of their operations. He addressed the possible role of the United Nations in helping developing countries to obtain information on company structures and of host countries of multinational enterprises in exchanging information on high-risk transactions and the operations of such enterprises.

32. He was of the view that the United Nations had a role as a forum where business administrations and civil society could come together to discuss those issues in a "safe space" that would further the understanding of where they were coming from. Areas of transfer pricing focus would vary from country to country, including because of the scale and type of business, specializations and the business and legal environments. It would be useful if the United Nations could help developing countries to prioritize those issues. In addition, there should be a discussion on step-by-step approaches to business models and whether that would be of value.

Agenda item 3
General legal environment

33. Addressing India's experience in establishing a transfer pricing legal environment, the first speaker said that India had set up its transfer pricing unit in 2001 following a "more open economy" policy which had resulted in more foreign direct investments. Acknowledging the need for a policy design that fit the local realities, authorities ought to design a stable policy that was appropriate to the type of industries found in a particular country, since frequent changes in legislation or regulations might create uncertainty for businesses.

34. Another speaker presented a few key factors which she thought would help to make the arm's length approach work more effectively: (a) the existence and broad acceptance of international rules and guidance such as the OECD Transfer Pricing Guidelines and the United Nations Transfer Pricing Practical Manual for Developing Countries; (b) specific domestic transfer pricing laws; (c) effective dispute resolution and avoidance of double taxation; and (d) "experience-based" comparables. When there were no local data for comparables, she argued, the taxpayer could make use of regional or global data. In certain cases, some types of objective and genuinely experience-based data might be used. She also suggested that in the case of developing countries, there was a need to identify the type of data countries had to start with to build a database of comparables and it might be necessary to have an initial ramp-up period before a full-scale database was established. Bodies such as the United Nations could have an important role in assisting that process in the future.

35. Another speaker commented that introducing specific transfer pricing regimes was not always a bad thing since certainty was important to business interests.

36. The need for quality data for countries to benefit from advance pricing agreement programmes was also noted. Another speaker commented that the use of quality data was hampered by the cost of obtaining such data from private entities selling access to databases.

Agenda item 4
Establishing transfer pricing capability in developing countries

37. The first speaker addressed the problem of obtaining qualified staff for the application of a transfer pricing programme and the data-deficiency issue. He suggested starting small and then growing; as the programme grew, the tax administration would develop more general rules and regulations.

38. Another participant expressed the view that in most cases small local businesses in developing countries ended up paying corporate tax while large multinational companies often paid little or no tax. It was very important to develop good investment policies and not to offer excessive tax incentives. He welcomed a public debate on concessions and tax incentives.

39. One speaker expressed the view that in many instances local companies did not know how to apply the arm's length principle. A study conducted in one country revealed that almost none of the 200 subsidiary companies interviewed knew how

internal prices were determined. Thus, there was a need to educate businesses. Customs officials also required training on how to identify transfer pricing risks.

40. Considering the issues of capacity-building and technical assistance, one participant commented on the importance of a good judicial system and a receptive parliament to enact appropriate laws. She also highlighted the importance of balancing the benefits of implementing transfer pricing regimes and the cost of their implementation. For the country as a whole, the benefits of transfer pricing implementation needed to be higher than its cost, and in that respect the Practical Manual should reflect the situation of each country.

41. In giving his perspectives on capacity-building, another speaker suggested that transfer pricing regimes were best introduced as part of broader tax policy reforms. The transfer pricing law should cover both domestic and international transfer pricing, especially in a country that offered tax incentives. The most practical way to secure the high level of expertise required for transfer pricing audits in the tax administrations in developing countries would be to have a transfer pricing team composed of a small group of auditors conduct a full-fledged transfer pricing audit, with other auditors addressing transfer pricing risks during ordinary audits.

42. In the general discussion, participants agreed that the benefits of well-focused capacity-building outweighed the costs. It was important in the area of transfer pricing, but such capacity-building should not be at the expense of work on other important subjects. The consistency of tax policies across different Government entities was also considered important; the uncertainty for both Government and taxpayers of lack of coordination within Government had capacity-building consequences. Capacity-building therefore needed to target the entire Government structure. One participant noted that provided there was sufficient political will, any incentives having a tax impact should be addressed in tax legislation alone. This would be a useful way of ensuring consistency and would make it easier to ensure that the tax consequences of incentives were fully accounted for.

43. Another participant noted that the main objective of investment promotion authorities was to encourage investment; there was sometimes excessive reliance on tax incentives, which could clash with the objectives of tax administrations. That was especially the case since the tax incentives were often not needed to attract investment.

44. It was noted by several participants that capacity-building should address the particular needs of a country; be premised on country ownership; and not be limited to transfer pricing without reference to its wider context. However, it was also noted that widespread reform was a costly and long-term process and that early reforms in strategic areas, such as analysing and "sunsetting" tax holidays, might be important, including in building support and credibility for longer-term changes.

45. One participant addressed the skill-building aspects of capacity-building, noting that the ability to offer a work-life balance that might not be available in consultancy firms was also a way of attracting and retaining high-quality staff.

46. The possibility of ensuring that officers could stay in the transfer pricing field after initial training, which would often take two years, was seen as important in many countries. However, others underlined that keeping the same people in one area for a long time could raise integrity issues.

47. One participant noted that even where international standards were recommended, ultimately, it was up to a particular country to decide what standards it adopted in transfer pricing. There was a recognized need for developing countries to be in a position to make those decisions and to play their part in developing the recommended standards. In that respect, the Secretariat noted that the purpose of the Practical Manual was not to tell countries what to do, but to assist those that had chosen to follow the arm's length approach in doing so at the practical level. That did not mean that discussions on broader and longer-term issues should not be held in the context of the Committee, including with a view to greater developing country involvement in setting what might become international standards.

Agenda item 5
Methods of achieving arm's length pricing

48. Chapter 5 of the Practical Manual presented different methods used to determine an arm's length price and discussed the strengths and weaknesses of each. In previous drafts, traditional methods and transactional profit methods had been covered in two different chapters, whereas the current draft dealt with them in one.

49. The first speaker noted that the chapter stayed as close as possible to the OECD Guidelines in substance, but differed in how it addressed the strengths and weaknesses of each method and that it provided, when they could be applied, examples and formula, to make it clear when and how the methods should be applied at a practical level. Aspects of transactional profit methods were also discussed in more practical detail than in the OECD Guidelines.

50. She referred to the discussions on how to deal with lack of comparables and the use of hypothetical or secret comparables and said that it might be useful to explore a sunset provision, where an objectively "experience-based" range could be used on a taxpayer opt-out basis for simple functions. Where the data would come from was obviously an issue and organizations such as the United Nations might have a role in that regard. Any such experience-based data would have to be transparent and broadly indicative of arm's length dealings and there would need to be a discussion on whether it should be based on global, regional or local experience.

51. The Chair noted that trying to apply transfer pricing methods without the necessary information would inevitably lead to failure and possible double taxation; thus, that issue was a practical topic for discussion.

52. The second speaker recognized the need for transitional periods in developing countries to allow adoption of a full-fledged regime of arm's length pricing but said he did not believe that a fixed-margins system could serve that purpose. A more appropriate concept of transition was to gradually lift the restrictive provisions of the previous closed economy regime. In relation to transitional downgraded or very simplified transfer pricing mechanisms, one needed to be aware of the difficulty in removing them once they were in place, especially if they gave tax concessions.

53. He held that the cases that were likely to be most usual for developing countries were in the traditional industries, where valuing intangibles (for example, brands or trademarks) was not so difficult. There was a need to provide guidance on comparables to developing countries, given the frequent absence of local

comparables and the need to make the necessary adjustments to foreign comparables, including for differences such as accounting principles.

54. Another speaker noted that determining corporate functions and valuing risks should be featured more fully in the chapter on methods. He underlined the importance of determining whether the people in charge of managing corporate functions were capable of managing such a function in the entity they were examining. It was important to consider not just the number of persons, but their skills and experience.

55. He emphasized that, from a business perspective, applying different transfer pricing standards in different countries would function effectively only if a robust dispute resolution and arbitration mechanism was established to address the points where a clash could lead to double taxation.

56. Another speaker argued that the Practical Manual should focus on simplifying and making transfer pricing guidelines enforceable for tax administrations in developing countries. The Practical Manual should not only reflect the OECD Guidelines but also take into account the circumstances of all Members States. In his view, the main issues were that: (a) it was too difficult for developing countries to apply the OECD Guidelines and it was not certain that the arm's length principle was in effect enforceable — thus, aligning with those Guidelines might not lead developing countries down the best path — the emphasis therefore needed to be on simplicity and enforceability; (b) the Practical Manual should be more objective about the practical difficulties of obtaining comparables; (c) the difficulty of obtaining necessary information should be confronted more directly and the Practical Manual should support country-by-country reporting more explicitly; (d) other alternative methods, such as safe harbours, the residual profit split method, fixed margins and hybrid methods should receive more consideration; (e) the use of transfer pricing methods to direct profits to tax havens should be addressed, and methods such as the reversal of the onus of proof should be addressed in the chapter on transfer pricing methods; (f) many of those who were involved in such work had a vested interest in complexity and the continued use of the OECD Guidelines — non-governmental organizations and independent academics therefore should be more involved in the development of the Practical Manual; and (g) it should be recognized that the current rules had been designed by developed countries and that developing countries needed to be more involved in the process, as noted in the keynote address by the Assistant Secretary-General. If the Practical Manual addressed the OECD Guidelines only, it could be criticized for that.

57. One speaker remarked that the chapter on methods was a core element of the Practical Manual and should function as a "toolkit" for administrations on how to apply the arm's length principle in practice. He referred to it as a road map to reaching arm's length outcomes but said that the choice of any particular transfer pricing method would depend on the circumstances and the information available. Anyone dealing with transfer pricing issues would need to be able to assess such issues, and a good tax auditor in any administration should be able to do so.

58. Another speaker referred to the experience of one country in using fixed margins for transfer pricing. That would eliminate the need to find comparables and constitute a simple and low-cost system for both taxpayers and authorities. He acknowledged that fixed margins needed to be carefully established in legislation, sufficiently industry-specific and transparent in formulation. He proposed that a

section on fixed margins be included in the chapter on methods or as a separate chapter.

59. In the ensuing discussion, participants exchanged views on which transfer pricing methods might be most suitable in different circumstances. There was a discussion on the nature of an "additional" method provided for in the legislation of some countries; it was suggested that if such an approach was sufficiently defined as a way of determining prices in accordance with the arm's length principle, it might be an experience that could benefit other countries. It was also noted that any "fixed" approach should recognize that some adjustments might be needed to take into account particular circumstances. One participant found it difficult to see how simplified margins could be consistent with the arm's length principle, and there was a discussion of whether such approaches would only work in very competitive markets where profits tended to equalize among competitors.

60. In summarizing, the Chair noted the general concern about the frequent lack of reliable information and limitations on the ability to analyse and adjust that information as necessary. He noted that the Committee could ask the Subcommittee on Transfer Pricing-Practical Issues to do some work on that issue in the future, separately from the current work on the Practical Manual. He also noted that capacity-building had been raised again, not only in terms of risk management, but also in terms of how to apply methods, including measuring functions, assets and risks

Agenda item 6
Comparability

61. The first speaker elaborated on the frequent lack of comparability data and referred to one country where, when searching for comparable transactions, the tax authorities had had to use European databases because there was no domestic alternative. The data were not fully comparable because of the differences and they had not made great strides in making adjustments to align with the domestic market; however, taxpayers had similar issues. A problematic issue was that many developing countries did not have the funds to pay the fees for accessing those databases and the taxpayers themselves might not have access. One possibility might be to implement legislation requiring financial information to allow databases to be built up.

62. Another speaker focused on functions, assets and risk analysis. For example, functions were particularly important when recruiting personnel, when it was essential to examine their skills and profiles. Market penetration strategies were an important issue for some countries. In determining who should bear the costs between the subsidiary and the parent, countries looked at the nature of the business as a whole and the relevant sector; filters would be applied after the databases were searched to make sure there was functional and economic comparability. They would look for publicly available material, including that required by other regulatory agencies internationally. It was very important to understand processes in a particular industry for comparability purposes. In India, comparables could mostly be found in appropriate databases, but those products were often complicated and the comparables could be hard to find.

63. Another participant expressed mixed feelings about comparability, noting that it was essential and complex, but there were always excuses for arguing that there was no comparability. That created uncertainty and led to frequent use of the transactional net margin method. Regardless of what comparable was used, arguments could always be made against it. The key was that the issue of comparability had to be approached with good faith. It was not just a case of documenting what you were doing, but also why you were doing it, what you were not doing and why not. That applied to Governments as well as taxpayers. The downside was that few decisions were black and white, and honesty and good faith were needed in addressing those uncertainties. The Practical Manual could deal with such issues at greater length.

64. One participant noted that a presumption, with a dynamic or shifting burden of proof, might help to deal with the cost of complexity and information-gap issues.

65. Summarizing the discussion, the Chair remarked on the benefits of harmonized approaches among countries in the same region. He noted that a technically good case might not be understood by a judge who was not a transfer pricing specialist; it was therefore important to make those complex issues as understandable as possible. Good documentation came from good data, which might be difficult to obtain since the multinational enterprises often had more access to such information than administrations.

Agenda item 7
Dispute resolution

66. The first speaker introduced the topic and explained that dispute resolution under transfer pricing was very similar to dispute resolution in a general mutual agreement procedure sense, currently under discussion by the Committee in the context of the United Nations Model Double Taxation Convention between Developed and Developing Countries. She noted the importance of effective dispute resolution mechanisms and stressed that if they were properly and robustly designed and implemented, they benefited tax administrations as well as business.

67. She noted the resource shortages in many developing country tax administrations and suggested practical and efficient dispute settlement mechanisms and dispute avoidance to assist them by improving their efficiency. She reflected upon the role of the mutual agreement procedure in ensuring that the purposes of double taxation treaties were furthered, including with respect to avoiding double taxation. The most successful mutual agreement procedure programmes exhibited characteristics of transparency, cooperation and a certain independence from the audit function.

68. With respect to advance pricing agreements, she noted that they might not be for everyone and that some caution should be exercised in recommending them as first options. However, they had an important role in many countries.

69. She considered that tax treaty arbitration was an important way to manage heavy dispute settlement loads, make competent authority processes work more smoothly and inspire confidence in the system. In practice, it was probably much more important than conciliation or mediation. The challenges, including whether

the costs of arbitration could be reallocated in a way that helped countries to accept the approach more readily, should be addressed in a practical manner.

70. The Secretariat pointed out that arbitration could contribute to greater certainty. However, the cost and complexity of arbitration could be a major challenge for many developing countries and might unduly weight the scales against them. If the cost was borne by the taxpayer (and the countries agreed on such close involvement of the taxpayer, which itself would often be an issue), there might be a perception that it could encourage arbitrators to make decisions unfavourable to the tax administration, and therefore that would not be a solution. It was also possible, at least in the early years, that arbitrators might be seen as lacking understanding of developing country realities and conditions. Extrabudgetary allocation for an arbitration and, in most cases, considerable foreign exchange amounts would often be required. If that was difficult, there would be a concern that a country might have to agree to a position for practical reasons even though objectively that might not be the most appropriate and fair outcome. Regarding the advance pricing agreement process, it was possible that countries should enter such a system only after careful consideration and only when they were confident that they knew the "rules of the game". Many countries might not feel they should, at an early stage, be expending scarce resources on the taxpayers most likely to be compliant. A staged approach to gaining confidence in the process was needed.

71. One speaker drew attention to the issue of how many resources countries should devote to advance pricing agreement programmes, dealing basically with compliant taxpayers. He said that a good arbitration provision should not be too costly; it could be beneficial for countries with considerable mutual agreement procedure experience but was not recommended for developing countries without such experience and expertise. More emphasis should be put on the issues of arbitration and dispute resolution outside the tax treaty context, since developing countries did not have strong treaty networks and had limited experience with arbitration provisions in that context. The United Nations might have an important role in developing a list of reliable experts for arbitrations.

72. Regarding the domestic aspect of arbitration and dispute resolution, one speaker referred to dispute settlement procedures in his country, where tax treaties were few in number and took a long time to be legislated. In practice, the issue was therefore more one of domestic dispute resolution than of arbitration under treaties. Many developing countries were hesitant to adopt arbitration and mediation in such a complex area and the tight budgetary circumstances of many of their administrations would make it difficult to obtain funding for arbitration cases. He noted the concerns about the arbitrators lacking developing country experience and understanding and drew attention to the need for developing country experts. That was an area where the United Nations had a role in capacity-building.

73. Responding to the issue of proper documentation not being provided by the taxpayer, one speaker raised the question of why developing countries did not establish strong presumptions in cases where there was a lack of documentation and the taxpayer was in a position to remedy that.

74. Another speaker noted that litigation was more expensive in developed countries than in developing countries; as a result, there was more transfer pricing litigation in developing countries. Such litigation took a long time to clear, so it was

important to find ways of avoiding or otherwise dealing with such disputes. Safe harbours were one possibility, but the practice was more difficult than the theory.

75. Another participant noted the strong business preference for the certainty and robustness of the investment regime that arbitration could provide. With respect to cost, some of the funds used for capacity-building could be used to support a standing panel so that developing countries would not have to bear those costs. In many cases, countries noted the issue of sovereignty and said they could not agree to arbitration, but he considered that they should at least examine whether they were signing treaties with similar clauses in other areas, such as investment agreements. He noted that in the practice of the European Union Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (European Union Arbitration Convention), one of the great benefits of an arbitration clause was to force mutual agreement procedure agreement. However, the Secretariat queried whether the practice of Europe would be applicable to a more imbalanced relationship between, for example, certain developed and developing countries, and there was a discussion about broader ways of addressing such imbalances.

76. One participant noted that arbitration provisions were robust and that they could be attractive to investors. It might be possible to modify them for developing countries by having the United Nations or other acceptable bodies propose or choose arbitrators. Properly applied, arbitration could cost less than other mechanisms, prevent integrity concerns and be less vulnerable to domestic processes. Another participant commented that, properly applied, arbitration might enhance the position of developing countries, providing access to expertise without high-level representations on a case-by-case basis to Ministers, for example.

Agenda item 8
Audit and risk assessment

77. The first speaker emphasized the importance of audit and risk assessment for developing countries and suggested that strategies should be adopted to encourage efficiency and effectiveness. It was important that countries identify which cases were high risk and which ones did not need to be pursued any further because they were not. Many countries did "risk-profiling", especially where the offshore related party was in a low-tax jurisdiction and scarce resources should be used as efficiently as possible. That was especially the case in the early years of a transfer pricing regime where the "low-hanging fruit" (clear examples of mispricing that would not require a great deal of resourcing) should be addressed prior to more complex and resource-intensive cases.

78. She said that, in determining risk assessment strategies, an important issue was whether to centralize or decentralize the transfer pricing units. She noted the possibility of introducing safe harbours at a risk assessment stage rather than at an audit stage, which would provide taxpayers with some degree of certainty as to whether they were likely to be audited. She also indicated that another important way of achieving robust risk assessment was to ensure that relevant information was readily available.

79. Another speaker presented a few points that he considered key to effective risk assessment. In assessing risk, the centralized approach would often be essential

when a country was starting off in transfer pricing. That did not mean that one unit in Headquarters should conduct the whole audit, but supervision from Headquarters was recommended in order to ensure the quality of risk assessments and audits. Obtaining the right information was essential and tax returns should include key information about related party transactions. Care must be taken with sharing information, as part of the risk assessment, with customs authorities. Customs information might be inaccurate, and taxpayers might also face a difficult situation in that their arguments to avoid anti-dumping actions could be used as a basis for transfer pricing adjustments.

80. With respect to the transfer pricing system, developing countries could often learn from other countries, but attention should be paid to domestic conditions that might be different in the two countries. A robust audit approach in a country with a very large domestic market or abundant natural resources might be successful, but a similar rigid approach in developing countries without those characteristics might deter foreign investment. When enacting new tax audit laws, he suggested tapping into the knowledge of lawyers and tax practitioners who, in some cases, might have more experience than tax administrators. Not every case could be audited, so working with tax practitioners as partners was very important especially at the early stage, to disseminate good behaviours among taxpayers.

81. Another participant indicated that administrations should think carefully about what they wanted from taxpayers in tax returns; asking too much might result in information they could not properly analyse, but asking the right questions could make risk assessment more informed and efficient. She referred to the current discussion in OECD circles on joint tax audits between different tax jurisdictions and said it was a creative idea that might facilitate more effective use of resources. However, such audits could be more efficient in resolving any potential tax disputes. She said that the use of target amounts of tax to be assessed by a tax official in a given period put a lot of pressure on the officials, although some countries might take that approach for integrity reasons. Lastly, the use of secret comparables made companies nervous either because sensitive business information was being used and the taxpayer had concerns about competitiveness or because information was being used as a comparable but companies did not have access to it for the purposes of challenging it.

82. Addressing the use of data from other sources, including customs, for comparability purposes, one participant concurred on the difficulty of the approach. He noted the value of such data and pointed out that even though customs administrations and tax administrations were looking for different things, they had common interests. Another participant noted that customs data might be especially important to a developing country heavily involved in trading commodities and with a heavy investment in ensuring trade data was accurate, especially since there might be little other useful data.

83. Another participant suggested that it might be useful to audit not just individual taxpayers but whole industries, since companies in the same industry tended to act similarly. Cross-country collaboration to develop an industry-wide view of compliance would help to build experience, develop a richer body of targets and economize on resources.

84. One speaker expressed difficulty with the idea of a joint audit of industry, since it was difficult to obtain information from one company in the presence of

other companies, and some issues were industry-wide while others were company-specific. It might be more productive to audit all companies in the industry, ensuring common issues were treated in the same way rather than auditing the industry as such. Joint audits might involve information that was not yet tested, since there was nothing to be compared with at that stage. He therefore was not certain how effective it would be in practice.

85. Another participant noted that his country had started a joint audit programme and that companies found it hard to understand why income tax authorities would examine materials and others, such as value added tax authorities, would separately examine similar materials later. In addition, personnel who worked very closely with a taxpayer for some years could become compromised; since training tax auditors was expensive, the issue of where to put those who had been potentially compromised and how to replace them was a concern. Even when accountants were brought in from the private sector, they needed extensive retraining.

86. Another speaker noted, for clarification, that joint audits need not be real-time audits, which might address some of the concerns mentioned. One participant noted that for reasons relating to anti-trust/competition laws, there were restrictions on what information could be shared between competitors. He was not permitted to meet with competitors and discuss anything but tax and even then, he had to record what he said. For example, in trying to establish what constituted a comparable price for a mineral in a country, the information might be readily available from competitors but for anti-trust/competition policy reasons it could not be sought.

Close of meeting

87. The Secretariat noted the importance of the meeting in the context of the convening power of the United Nations on tax cooperation issues and the important role of the non-governmental organizations in the debates. The dialogue had brought forth many very different but very valid viewpoints; they had been put forward in a spirit of respect and cooperation and could now be assimilated into the Practical Manual in a manner that met developing country needs. The report would be forwarded to the subcommittee responsible for drafting the chapters, for consideration at its meeting in September 2011.